No. 82-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a public defender who conspired with state officials to deprive his client of fundamental constitutional rights is absolutely immune from liability under 42 U.S.C. § 1983.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes set out by the petitioners, the resolution of the issue in this case involves 18 U.S.C. § 242 and 28 U.S.C. § 1915 (d).

18 U.S.C. § 242 provides in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 1915 (d) provides in pertinent part:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous.

STATEMENT OF THE CASE

Petitioners Tower, a county public defender, and Babcock, a state public defender, knowingly and deliberately conspired with state officials to deprive Billy Irl Glover of a fair trial and appeal. (J.A. 9, 10). Tower failed to obtain necessary documents from state agencies that would have enabled him to prepare a proper defense for Glover in his criminal trial. (J.A. 7). Tower conspired with state officials so that he did not obtain the documents necessary for Glover's defense at trial. (J.A. 5, 6)

Following his conviction, Glover requested that petitioner Babcock, the state public defender, address certain essential issues on appeal. (J.A. 8). Babcock instead conspired with state officials to cover up the earlier agreements with Tower, (J.A. 9), and as a result filed an appellate brief that was incomplete, inadequate and in error (J.A. 8). The conspiracy involved the trial court judges, (J.A. 5), and appellate judge Johnson, the Oregon attorney general at the time of Glover's conviction who later placed himself on the panel that heard Glover's appeal. (J.A. 9, 43). Believing that no state court would call to task the conspirators who had knowingly and deliberately deprived him of his liberty, Glover sought redress through an action filed under 42 U.S.C. § 1983. (J.A. 9, 10)

SUMMARY OF THE ARGUMENT

Public defenders who conspire with state officials to deprive a client of his fundamental constitutional rights should not be immune from liability under 42 U.S.C. § 1983. A judicial grant of absolute immunity for public defenders is not supported by the language or legislative history of § 1983. Congress intended the statute to be broadly construed in order to provide a federal avenue of redress for the deprivation of constitutional rights. Public defenders who conspire with public officials to deprive their clients of constitutional rights commit the very type of wrong that Congress sought to remedy in the enactment of § 1983.

This Court has never accorded any person immunity from suit under § 1983 when that person did not have a comparable grant of immunity at common law. The common law does not support a grant of absolute immunity for public defenders because they are functionally equivalent to private defense counsel, who had no immunity at

common law except for defamatory remarks at trial. All defense counsel effectively retain their common law defamation immunity under § 1983, because a lawyer's traditional functions as counsel to a defendant are not performed under "color of law" for the purposes of § 1983, and thus are not subject to suit. The petitioners have failed to justify any expansion of the immunity already given defense counsel under § 1983.

Public defenders, like court appointed counsel, do not perform a quasi-judicial function in the judicial process. Their primary, if not their only, responsibility is to represent an individual client's interests. This function is in direct contrast to the broader public responsibilities performed by a government official such as a prosecutor or judge. A public defender does not exercise quasi-judicial judgments on the basis of evidence presented as do judges, prosecutors, grand juries, and parole boards, so a grant of quasi-judicial immunity is improper. Further, a public defender's conspiratorial agreement with a state official is beyond the scope of traditional defense functions, and should not be protected. All persons granted immunity by this Court are protected only for acts performed within the scope of their professional duties. Because a prosecutor is given immunity protection only for acts within the prosecutorial function, public defenders should be similarly limited in their protection from suit under § 1983 to acts within the defense function.

Public defenders should not be given a qualified immunity under § 1983 because they are not governmental officials and did not enjoy a qualified immunity at common law. Public defenders do not exercise their discretion in the public interest, so the importance of a federal damages remedy that protects the rights of individual citizens rises to a level of paramount importance. The public

policy and historical considerations for granting qualified immunity simply do not apply to this case.

Public defender immunity would inevitably result in a denial of equal protection for some indigent criminal defendants under the present Oregon statutory scheme. Under current Oregon law, some indigent defendants are represented by court-appointed counsel in counties that do not have public defender systems. These defendants have a potential avenue of redress under § 1983 against their court-appointed attorney. Indigents represented by public defenders in counties with public defender systems could not bring suit against their defense counsel under § 1983 if public defenders gain absolute immunity. A grant of absolute immunity would result in the arbitrary denial of equal access to a federal remedy under Oregon law.

Public policy mandates that public defenders should be subject to § 1983 liability. Alternate avenues to redress constitutional violations are inadequate because Congress intended § 1983 to supplement state remedies. Criminal actions cannot be instituted by the individual, habeas corpus proceedings fail to compensate one deprived of constitutional rights, and state malpractice actions may be thwarted by a state provided immunity defense. Deprivations of constitutional rights are more serious than violations of state rights, and therefore deserve a federal remedy.

Empirical evidence does not indicate that public defender liability under § 1983 will overburden the criminal justice system. Available evidence indicates that conditions of confinement, rather than a prisoner's dissatisfaction with representation, provides the basis for most § 1983 suits. Further, few § 1983 suits proceed beyond the pleading stage due to the difficulties of stating a

sufficient claim. Statistics demonstrate that defenders actually devote little time to the defense of § 1983 suits. Moreover, defenders are usually covered by malpractice insurance, or as this case exemplifies, can obtain legal representation through the state attorney general. All of petitioners' policy arguments are speculative, and unsupported by empirical evidence. Public policy considerations defy a grant of public defender immunity when it will result in an unjustifiable erosion of fundamental constitutional rights.

ARGUMENT

I. Glover Stated A Sufficient Claim For Relief Under 42 U.S.C. § 1983.

Section 1 of the Civil Rights Act of 1871 provides a federal remedy in money damages against "every person who, under color of any statute . . . of any state . . ., subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution." 42 U.S.C. § 1983 (1976). The text of § 1983 articulates a two part jurisdictional requirement: the aggrieved party must have suffered (1) the deprivation of a constitutional right, (2) by a person or persons acting "under color of law." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Billy Glover alleged the requisite jurisdictional elements of § 1983 in his claim for relief against petitioners Tower and Babcock. Glover alleged that petitioners deprived him of his sixth amendment right to counsel and fourteenth amendment right to due process through a conspiracy with state agents, Glover's trial judges, the state Attorney General, and a certain judge of the Oregon Court of Appeals.[1] The named officials, as agents of the

[1] Glover's complaint alleged that his public defender at trial, petitioner Tower, conspired to prevent him from obtaining records held

state, clearly meet the necessary "color of law" jurisdictional requirement that is also imputed to petitioners by virtue of their participation in the conspiracy. *See Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980).

Judicial immunity does not operate as a jurisdictional bar to the institution of a § 1983 suit against persons who conspired with the judge, nor can the co-conspirators derive immunity from the state officials with whom they conspired. 449 U.S. at 31-32. Glover's trial and appellate judges' immunity cannot therefore bar Glover's properly stated § 1983 claim against petitioners Tower and Babcock.

II. Congress Intended That § 1983 Be Liberally Construed To Provide A Broad Federal Remedy For The Deprivation Of Fundamental Constitutional Rights. The Statute's Remedial Purpose And Scope Defy The Creation Of An Immunity Defense For Public Defenders.

It is well-settled that § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). The statute's language is absolute and unqualified, with no mention made of any privileges, immunities or defenses that may be asserted. *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 635 (1980). This Court has recognized, however, that the tort liability created by § 1983 cannot be read in a historical vacuum, but that it must be construed in light of legislative history and applicable common law principles. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 246, 258 (1981).

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by state agencies that were necessary for Glover's defense. (J.A. 5, 6). Glover further alleged that his appellate public defender, petitioner Babcock, conspired with state agents to cover up the prior agreements with Tower, (J.A. 9), and to present an inadequate appellate brief. (J.A. 8).

Legislative history shows that Congress enacted § 1 of the Civil Rights Act of 1871 to provide a liberal and independent federal remedy for persons who had been deprived, under color of law, of rights guaranteed by the United States Constitution through the fourteenth amendment. *Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108, 1117 (1983). The congressional sponsor of § 1983 emphasized the statute's remedial purpose:

> [This] act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. . . . [A]s has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

While Congress intended primarily to rectify the unwillingness of state officials to enforce state laws against the Ku Klux Klan, *Monroe* v. *Pape*, 365 U.S. 167, 201 (1961) (Harlan, J., concurring), the tone of the congressional debates was in general "surely one of overflowing protection of constitutional rights." *Id.* at 196. The sweeping language of the statute and the legislative history indicate that Congress intended § 1983 to be broadly construed in order to adequately redress injuries of constitutional proportions. *Id.* at 201. Congress did not close its eyes to unjust convictions which result from conspiratorial agreements by excluding these wrongs from the broad reach of the statute. Contrary to petitioners' stilted interpretations, a deprivation of constitutional rights that results from a conspiracy between state offi-

cials and private persons to cause an unjust conviction is of the same constitutional import as the deprivation of rights caused by the unwillingness of state courts and prosecutors to seek and impose criminal punishment.

Congress did not intend to simply federalize state tort law in enacting § 1983, but instead sought to "give a broad remedy for violations of federally protected civil rights." *Monell* v. *Department of Social Services*, 436 U.S. 658, 685 (1978). "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy." *Monroe*, 365 U.S. at 196 (Harlan, J., concurring). This Court should not extend a new grant of absolute immunity under § 1983 "in the absence of the most convincing showing that the immunity is necessary." *Imbler*, 424 U.S. at 434 (White, J., concurring.) Because the statute is remedial, this Court should not abrogate the scope of protection Congress sought to provide. Where constitutional rights are at stake, courts should properly construe statutes to avoid the conclusion that Congress intended to use the privilege of immunity so as to defeat the statutory purpose. Bator, Mishkin, Shapiro, and Wechsler, *Hart and Wechsler's The Federal Court and the Federal System* 336 (2d ed. 1973). Public defender immunity would severely erode the guarantee of constitutional rights that Congress sought to protect through § 1983.

III. Common Law Principles Do Not Support A Judicial Grant Of Immunity For Public Defenders.

A. Public defenders are functionally equivalent to private defense counsel, so an immunity defense is improper.

The burden of establishing the right to an immunity defense is on the official claiming its entitlement. *Dennis*, 449 U.S. at 29. When a defendant in a § 1983 suit asserts

an immunity defense, this Court recognizes it only if the common law historically accorded that person immunity from suit. *Imbler*, 424 U.S. at 421. *Tenney* v. *Brandhove*, 341 U.S. 367, 376-377 (1951).

The concept of publicly appointed and subsidized representation for indigent criminal defendants did not exist at common law. *Robinson* v. *Bergstrom*, 579 F.2d 401, 409 (7th Cir. 1978); *Minns* v. *Paul*, 542 F.2d 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *Betts* v. *Brady*, 316 U.S. 455, 466 (1942). Public defender programs were largely created after 1963, in response to the due process requirements established by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and its progeny.[2] The void created by a paucity of common law history, however, may be remedied by comparing the function of the position at issue with that of a similar position which had immunity at common law. *Imbler*, 424 U.S. at 422-423.

This Court has affirmatively stated that "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979). Thus, the court appointed attorney is no more a public official than his private counterpart.

> Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. *His principal responsibility is to serve the undivided interests of his client.* Indeed, an indispensable element of the effective performance of his responsibili-

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[2] At least one state, however, has had court-appointed attorneys for indigent criminal defendants since 1892. *See Spring* v. *Constantino*, 362 A.2d 871, 874 n.2 (Conn. 1975).

> ties is the ability to *act independently of the government* and to oppose it in adversary litigation." 444 U.S. at 204 (emphasis added).

From the moment that a public defender is appointed, he assumes a relationship with the accused that is identical to that existing between any other defense lawyer and client. *Polk County* v. *Dodson*, 454 U.S. 312, 318. The public defender serves a private function, so governmental immunity is inappropriate.

In *Ferri*, this Court held that a court appointed attorney does not have immunity under federal law from a state malpractice action. *Id.* at 205. Although the attorney had been appointed under the Criminal Justice Act and paid by the government, the Court noted that "countless private citizens are the recipients of federal funds of one kind or another, but Congress surely did not intend that all such recipients would be immune for actions taken in the course of expending those funds." *Id.* at 201. A public defender system's source of operational funds, whether federal, state or county, does not therefore justify a new grant of immunity.

In *Polk County*, *supra*, the respondent argued that even if the "function" of a public defender is not distinct from that of a private lawyer, the public defender's "status" is materially different from that of the private defense attorney. 454 U.S. at 320-321. This argument was rejected in favor of the view that a public defender's "status" is insufficient to establish that a public defender acts under "color of state law." 454 U.S. at 321. Defense of the criminally accused is essentially a *private function*—whether filled by retained counsel, appointed counsel, or a public defender. *Id.* at 318-319. The same reasons that prompted this Court to state that public defenders do not act "under color of law" also dictate that defenders do not

warrant the cloak of governmental immunity. Since public defenders perform precisely the same function as court appointed and private defense counsel, public defenders should only obtain the limited immunity that is afforded private defense counsel.

1. Defense attorneys do not have immunity at common law except for defamatory remarks made at trial. Public defenders should have the same limited immunity under § 1983.

Privately retained attorneys did not have blanket immunity from all liability at common law. They were subject to malpractice actions based upon prior civil and criminal proceedings. *See Branson* v. *Oregon Railroad*, 10 Or. 278, 295 (1881); *Malone* v. *Sherman*, 49 N.Y. Sup. Ct. 530 (1883). Several states currently deny immunity for public defenders in malpractice actions. *Spring* v. *Constantino*, 362 A.2d 871, 879 (Conn. 1975); *Reese* v. *Danforth*, 406 A.2d 735 (Pa. 1979); *Donigan* v. *Finn*, 290 N.W.2d 80 (Mich. 1980).

Numerous federal courts have also reached the conclusion that the common law accords no immunity to public defenders sued by clients for malpractice. *See White* v. *Bloom*, 621 F.2d 276 (8th Cir. 1980); *Robinson* v. *Bergstrom*, 579 F.2d at 411; *Tasby* v. *Peek*, 396 F. Supp. 952, 958 (W.D. Ark. 1975); *Louisiana* v. *Crolino*, 393 F. Supp. 1362, 1364 (D. Nev. 1974); *Hill* v. *Lewis*, 361 F. Supp. 813, 818 (E.D. Ark. 1973); *United States* v. *Blacker*, 335 F. Supp. 43, 46 (D.C.N.J. 1971); *Vance* v. *Robinson*, 292 F. Supp. 786, 788 (W.D.N.C. 1968).

The common law provided counsel with a minimal shield of immunity in that defamatory statements made during judicial proceedings were privileged only if the remarks were relevant to the subject matter at issue. *Imbler*, 424 U.S. at 426 n.23. Prosecutor and defense

counsel were given latitude solely for the examination of witnesses and for commentary upon witness testimony and demeanor under oath. Veeder, *Absolute Immunity in Defamation; Judicial Proceedings*, 9 Colum. L. Rev. 463, 482 (1909). Courts granted trial counsel immunity from defamation suits as a means to promote the free and unfettered administration of justice. *Id.* at 482.

This Court need not extend immunity to all acts within and without the defense function in order to preserve the policies that underlie defamation immunity. A public defender's defamation immunity is effectively preserved under § 1983 by virtue of the color of law pleading requirement. Under *Polk County*, *supra*, the acts performed during traditional defense functions (including defamatory remarks) are not exercised under "color of law," and thus are not subject to § 1983 lawsuits. 454 U.S. at 324.

In *Owen* v. *City of Independence*, 445 U.S. at 638, this Court explained that all common law immunities are not automatically incorporated into § 1983:

> [T]he Court's willingness to recognize certain traditional immunities as affirmative defenses has not led it to conclude that Congress incorporated all immunities existing at common law. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 243, 94 S.Ct. 1683, 1690, 40 L.Ed 2d 90 (1974). Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983. *See Imbler* v. *Pachtman*, 424 U.S. at 424.

Because defense counsel had limited immunity at common law, this Court should not now further expand the immunity provided by § 1983. Common law defamation

immunity does not support boundless immunity for public defenders when "performing their role in the judicial process" as petitioners assert. (Petitioners' brief at 20). Petitioners have not justified any expansion of the immunity which was incorporated into the statute by Congress. Public defenders should be liable for conspiratorial acts which deprive their clients of constitutionally protected rights.

B. Public defender immunity is improper because defenders exercise a private function, not a quasi-judicial function.

Judicial immunity exists because judges, in whom discretion is entrusted, must be able to exercise vigorous and impartial discretion on behalf of the public without apprehension of subsequent burdensome litigation. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). Courts have sparingly accorded § 1983 immunity to other participants in the judicial process. Too broad a swath of protection from suit would judicially repeal the congressional mandate that "every person acting under color of law" is subject to suit for actions which deprive others of constitutional rights. *See City of Newport*, 453 U.S. at 259. Absolute immunity is therefore extended only to those other participants in the judicial process who exercise a "quasi-judicial" decision making function similar to that of the judge, such as prosecutors,[3] grand jurors,[4] petit jurors,[5] and parole board members.[6] The dispositive attribute is therefore not a formal association with the judicial proc-

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[3] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

[4] *Id.*

[5] *Butz* v. *Economou*, 438 U.S. 478, 509 (1978) (dictum).

[6] *Silver* v. *Dickson*, 403 F.2d 642 (9th Cir. 1968).

ess, but rather the actor's exercise of a quasi-judicial function.

When one involved in the judicial process does not exercise a judicial or quasi-judicial function, he has no immunity, despite the person's integral relationship with the judicial system. Court stenographers,[7] jailers,[8] and court clerks,[9] do not serve a quasi-judicial function in the judicial process, and therefore do not have immunity founded on federal interests. Court appointed counsel do not have federal immunity from state malpractice suits because they serve a private, not a quasi-judicial function in the judicial process. *Ferri*, 444 U.S. at 202-204. Public defenders, like court appointed attorneys, also perform a purely private function, and thus should not be given quasi-judicial immunity from § 1983 lawsuits.

The prosecutor and the public defender perform functions so different in nature that any attempt to functionally compare the two is suspect. Contrary to petitioners' assertions that a public defender performs "equivalent judgmental functions" to that of a prosecutor (petitioners' brief at 23-24), defender judgments relate only to an individual client's case, as opposed to the purely *public* nature of prosecutorial judgments. This Court has emphasized that "the primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state." *Branti* v. *Finkel*, 445 U.S. 507, 519 (1980). "This [function] is in contrast to

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[7] *Washington* v. *Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966).

[8] *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

[9] *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972).

the broader public responsibilities of an official such as a prosecutor." *Id.* at 519 n.13.

A public defender's investigatory decisions and allocation of fiscal resources relate only to individual client interests, not the public interest. The resource allocation decisions made by a prosecutor, in contrast, represent the interests of the public constituency as a whole. Policy decisions made by a public defender "must relate to the needs of individual clients." 445 U.S. at 519. Thus, the "special nature" of public defender responsibilities (petitioners' brief at 23) do not compare at all to the public nature of a prosecutor's responsibilities.

A prosecutor's immunity for malicious prosecution is based on decisions similar to those made by a grand jury as to whether a particular prosecution should be instituted or followed up. *See Yaselli* v. *Goff*, 275 U.S. 503 (1927). The decision to prosecute is quasi-judicial because the prosecutor must exercise a discretionary judgment on the basis of evidence presented. *Imbler*, 424 U.S. at 423 n.20. Public defenders, however, are not authorized to initiate or terminate a case, nor do they decide the guilt or innocence of their clients. A functional comparison between public defender and prosecutor disproves petitioners' theory of defender immunity.

The witness is the only participant in the judicial process who possessed immunity at common law despite having no judicial or quasi-judicial decision making authority. *See Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108 (1983). Public policy mandates witness immunity so that testimony at trial may be free of distortions that can potentially result from the fear of subsequent civil liability. *Id.* at 1114. These public policy concerns do not provide a persuasive basis for extending immunity to public defenders. Therefore, because the public defender does

not perform a quasi-judicial function, a grant of immunity is improper.

C. When a public defender conspires with a government official to deprive his client of constitutional rights, he acts outside the scope of his professional duties. Immunity should not be accorded to acts that are outside the scope of professional duties.

Never has a grant of immunity been extended to persons acting outside the scope of their professional duties. *See Stump* v. *Sparkman*, 435 U.S. 349, *reh'g denied*, 436 U.S. 951 (1978). A public defender's conspiracy with a judge or other public official is not within the ambit of traditional defense functions, so a policy that mandates defender liability under § 1983 is proper.

A prosecutor is absolutely immune only for acts taken within the prosecutorial function, which includes the initiation of a prosecution and the presentation of the state's case. *Imbler*, 424 U.S. at 430-431. The *Imbler* Court expressly reserved the issue whether a prosecutor has absolute immunity when he acts as an administrator or investigative officer, but the courts of appeals generally have ruled that prosecutors do not enjoy immunity for the performance of these tasks. See *Mancini* v. *Lester*, 630 F.2d 990, 992 (3d Cir. 1980); *Coleman* v. *Turpen*, 697 F.2d 1341, 1346 (10th Cir. 1982); *Beard* v. *Udall*, 648 F.2d 1264, 1271 (9th Cir. 1981); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973); *cert. denied*, 415 U.S. 917 (1974) (prosecutor's immunity ceases when he acts in a capacity other than his quasi-judicial role); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Similarly, judges enjoy absolute immunity only for those acts performed within the scope of their judicial capacity and concurrent subject matter jurisdiction. *Stump* v. *Sparkman*, 435 U.S. at 355-357, 361.

Public officials are given immunity solely for the benefit of the public whose interest it is that those officials should be at liberty to exercise their proper public functions with independence and without fear of consequences. *See Pierson*, 386 U.S. at 554. The conspiratorial actions that petitioners now assert should be cloaked with immunity are not equivalent to the public functions that this Court has determined need protection. Section 1983 liability for conspiratorial actions will not affect a public defender's ability to exercise primary lawyering functions with independence and without fear of reprisal. The conspiracy requirement limits the number of triable suits to those that are predicated upon acts outside the scope of a public defender's authorized lawyering functions. This Court should not extend public defender immunity beyond the bounds already recognized by Congress in the enactment of § 1983.

D. Public defenders are not governmental officials so they are not entitled to qualified immunity.

Petitioners correctly argue that public defenders should not be given qualified immunity, but arrive at this upon faulty reasoning. The availability of an immunity defense is derived from an analysis of the functions and responsibilities of the actor *in his capacity as a state official* in light of the purposes of § 1983. *Scheuer*, 416 U.S. at 242-243.[10] A finding of qualified immunity, like a

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[10] This Court has accorded immunity to the following various government officials under § 1983 and claims brought directly under the Constitution: state legislators (absolute immunity) *Tenny* v. *Brandhove*, 341 U.S. 367 (1951); federal executive officials (qualified immunity) *Butz* v. *Economou*, 438 U.S. 478 (1978); state prison officials (qualified immunity) *Procunier* v. *Navarette*, 434 U.S. 555 (1978); congressional aides (absolute immunity) *Gravel* v. *United States*, 408 U.S. 606 (1972); state governors university presidents

finding of absolute immunity, is usually preceded by an inquiry into whether the actor enjoyed immunity at common law. *Dodson* v. *Polk County*, 628 F.2d 1104, 1107 (1980), *rev'd on other grounds*, *Polk County* v. *Dodson*, *supra*. The common law qualified immunity standard defies inclusion of public defenders because they are not, as this Court has repeatedly recognized, "public officials." *See Ferri*, 444 U.S. 193. The inquiry then shifts to determine whether public defenders should enjoy qualified immunity as a matter of public policy.

The recognition of a qualified immunity defense for public officials reflects "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' " *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807, *quoting Butz* v. *Economou*, 438 U.S. at 504-506. Because public defenders are not officials who represent the public interest in an exercise of official authority, the second prong of the *Harlow* balancing test is moot. The protection of citizen rights through the § 1983 damages remedy therefore is paramount over any other policy considerations. As a matter of public policy, defenders should not have a qualified immunity from their already limited exposure to § 1983 liability.

(qualified immunity) *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); President United States (absolute immunity) *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); police officers (qualified immunity) *Pierson* v. *Ray*, *supra*; state hospital superintendents (qualified immunity) *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); school board members (qualified immunity) *Wood* v. *Strickland*, 420 U.S. 308 (1975).

IV. Public Defender Immunity Would Result In The Deprivation Of Equal Protection Under Oregon Law For Similarly Situated Indigent Criminal Defendants.

Public defender immunity under § 1983 will inevitably result in a denial of equal protection for certain indigent defendants in Oregon. Under O.R.S. 151.010 and O.R.S. 151.150 Oregon district and circuit court judges are empowered to appoint either a private defense attorney or a public defender to represent indigent criminal defendants. Petitioners' brief at App. 1-2. Courts therefore appoint only private defense counsel to represent indigents in the twenty-eight Oregon counties which do not have public defender systems. Those defendants who receive private representation under authority of Oregon law have a potential avenue of redress under § 1983. An indigent represented by a public defender under the same laws, however, will be precluded from bringing suit under § 1983 if defenders have immunity. Thus, similarly situated indigent criminal defendants will be deprived of equal protection under Oregon laws.

This Court has recognized that poverty cannot be the sole reason for the denial of access to a judicial proceeding, because such arbitrary state procedures violate the Due Process Clause of the fourteenth amendment. *Boddie* v. *Connecticut*, 401 U.S. 371, 376, 383 (1971). Also, once the right to appeal has been accorded by statute it "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey* v. *Normett*, 405 U.S. 56, 77 (1972). The Equal Protection Clause will potentially be violated under Oregon law because the § 1983 claims of indigents represented by public defenders will be barred by immunity, but the § 1983 claims of indigents represented by court appointed counsel will proceed without hindrance. Whether an indigent person is represented by

court appointed counsel or by a public defender in Oregon depends solely upon the statutory scheme and the luck of the draw. The arbitrariness of such a system is obvious. This Court should not grant immunity to public defenders under § 1983 when it will result in a denial of equal access to the courts for certain indigent criminal defendants.

The Oregon statutory scheme may also cause indigent defendants to receive ineffective assistance of counsel. The right to assistance of counsel at a criminal trial is essential to a system of equal justice, but the right to counsel is valueless if it does not mean the right to effective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970); *see Powell* v. *Alabama* 287 U.S. 45 (1932).

Immunity from § 1983 liability effectively reduces an attorney's accountability to his client. An attorney without full accountability will not likely perform his duties with due care. The American Bar Association recognized this fact long ago when it prohibited any attorney from entering into a contractual agreement with his client "to exonerate himself from or limit his liability to his client for his personal malpractice." Model Code of Professional Responsibility DR 6-102(a).

Public defender immunity would cause a potential denial of the sixth amendment right to effective assistance of counsel for those indigents who are represented by public defenders under Oregon law. Indigents similarly situated may receive differing qualitative levels of legal representation as a result of the joint operation of federal public defender immunity and Oregon criminal defense laws. Section 1983 provides indigents the sole means of vindicating constitutional rights. One indigent should not be precluded from obtaining money damages for the deprivation of fundamental constitutional rights when

another, similarly situated, has open access to remedies under the same statute. Public defender immunity under § 1983 is therefore unwarranted and constitutionally suspect.

V. Public Policy Considerations Mandate That Public Defenders Should Be Subject To § 1983 Liability.

A. Alternate state remedies do not adequately redress the violation of fundamental constitutional rights.

Petitioners argue that an indigent client may use alternate remedies to redress constitutional violations. These alternatives are inadequate because Congress enacted § 1983 to *supplement* state remedies. *Monroe* v. *Pape*, 365 U.S. at 167. Further, a plaintiff need not first exhaust state remedies before bringing a federal action under § 1983. *Id.* In *Monroe*, this Court stated that persons must have access to a neutral federal forum in order to litigate federal rights because, "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

Only the federal govenment can bring criminal charges against a public defender under 18 U.S.C. § 242 (1976), the criminal analog of § 1983. An indigent cannot institute such action, and the § 242 proceeding does nothing to redress the indigent's constitutional injuries. Professional sanctions have little practical effect. "Unfortunately, the bar associations, like most professional societies, have shown themselves unable or at least unwilling, to police their own members." *Bazelon, The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 17 (1973). Moreover, professional disciplinary action gives no remedy to the indigent.

Federal and state habeas corpus proceedings only remedy a loss of liberty and fail to compensate a citizen who has suffered a violation of other civil rights. A malpractice suit generally poses a false hope for the indigent who cannot afford to retain private counsel in the first place. Even if the second attorney can be retained on contingency, a malpractice suit may still be thwarted by tort immunity for public defenders under state law. *See Walker* v. *Kruse*, 484 F.2d 802 (7th Cir. 1973) (dicta); *Polk County* v. *Dodson*, 454 U.S. at 453.

The remedies that petitioners recommend have limited impact. Some are designed only to gain a prisoner release from custody, while others only punish the errant defender. None give monetary compensation to the wronged indigent defendant. None of the proposed remedies afford the type of relief mandated by Congress under § 1983. As Justice Harlan admonished, "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy." *Monroe*, 365 U.S. at 196 (Harlan, J., concurring). Public defender immunity would cripple the broad remedy that Congress intended § 1983 to provide for violations of federally protected civil rights.

B. Public defender liability under § 1983 will not overburden the criminal justice system.

Public defender liability under § 1983 will not result in "a wide range of frivolous § 1983 suits which will consume the time and energy of an already overburdened criminal justice system." (quoting petitioners' brief at 26). While the total number of prisoner-filed civil rights suits may have increased over the past ten years, petitioners are merely speculating that a significant number have been filed against public defenders or court appointed attor-

neys. Statistics do not specify the percentage of prisoner suits which named former defense attorneys as defendants, nor the number of suits alleging a conspiracy. Statistics also do not foreshadow a new surge of § 1983 suits if immunity is denied.

It is true that accurate statistics regarding § 1983 litigation are difficult to obtain.[11] Published studies, however, indicate that prisoner civil rights suits filed against former defense attorneys do not burden the federal courts. One study, which focused on the United States District Court for the Central District of California, revealed that of the 125 prisoner civil rights cases filed in 1975, only seven claims alleged problems of legal representation. Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 Cornell L. Rev. 482, 535 n.237, 555 (1982). Only five of the 87 cases filed in the same district during 1976 dealt with prior legal representation. *Id.* Most § 1983 claims during both years involved prison conditions. *Id.* at 538.

A study which focused on five federal districts found that almost 80% of prisoner civil rights suits filed in 1975, 1976 and the first six months of 1977 dealt with claims relating to conditions of confinement. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 623 (1979).[12] Other claims in the same study primarily alleged "parole denial

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[11] The basic source regarding the number and types of suits filed in federal court each year is the Administrative Office of the United States, Annual Report of the Director. While the Annual Report records the number of civil rights suits filed against attorneys, including public defenders, prisoner lawsuits are not categorized more specifically than "prisoner civil rights."

[12] It is hardly surprising that the majority of prisoner civil rights cases concern conditions of confinement. "What for a private citizen

or revocation, detainers, sentence computation, improper arrest or police misconduct, prosecutorial misconduct, erroneous conviction or unfair trial, and problems with court personnel." *Id.* Prisoner claims directed against court-appointed attorneys or public defenders evidently lacked sufficient frequency and significance to merit specific mention in the Turner study.

Statistics which reflect the number of suits filed paint a distorted picture because most § 1983 claims never reach the trial stage. The 1976 Eisenberg study showed that of the 125 § 1983 cases filed in 1975, only three went to trial. None of the 87 prisoner civil rights cases filed in 1976 went to trial. Eisenberg, *supra*, 67 Cornell L. Rev. at 554. In fact, almost 97% of all prisoner-initiated § 1983 cases terminated in federal court in 1979 were dismissed at the pleading stage or otherwise concluded prior to trial. Prisoner Civil Rights Committee, Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* 10 (1980) (hereinafter "Aldisert Report"). The Turner study yielded similar findings.[13]

That few § 1983 suits proceed beyond the pleading stage is hardly surprising. Many plaintiffs are unedu-

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would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state." *Preiser* v. *Rodriquez*, 411 U.S. 475, 492 (1973). Every such dispute can be filed under § 1983.

[13] Turner found that a high proportion of prisoner cases are disposed of at the pleading stage. In the Eastern District of California, 80.4% of the cases filed in 1976 were terminated by the court. In the same year, the District of Massachusetts tried no prisoner claims and the Northern District of California and the District of Vermont tried only one prisoner case. Nationally, only 268 or 4.2% of all prisoner cases went to trial. *Turner*, *supra*, 92 Harv. L. Rev. at 617-618.

cated, without funds, possibly incarcerated, and unfamiliar with the civil machinery of the legal system. Mallen, *The Court Appointed Lawyer and Legal Malpractice-Liability Immunity*, 14 Am. Crim. L. Rev. 59, 69 (1976). Moreover, the majority of prisoner civil rights cases are dismissed *sua sponte* under authority of 28 U.S.C. § 1915(d) (1976) when a court determines that the action is "frivolous or malicious." *See* Aldisert Report, *supra*, at 59-63. The Turner study found that 68% of all prisoner cases filed nationwide in 1978 were terminated by the court without any response from the defendant. Turner, *supra*, 92 Harv. L. Rev. at 617-618. Furthermore, local rules may authorize the dismissal of a claim when the party fails to proceed with diligence. Local rule 260-3, United States District Court, District of Oregon.

Section § 1983 pleading hurdles are now higher than ever. A plaintiff must adequately allege a deprivation of constitutional rights "under color of law." While it is true that a *pro se* complaint must be liberally construed, *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972), it must nevertheless state a sufficient claim. Conclusory allegations without supporting facts are subject to immediate dismissal. *See Sooner Products Co.* v. *McBride*, 708 F.2d 510, 512 (9th Cir. 1982). The practicalities of pleading thus act to further confine a defender's potential exposure to § 1983 litigation.

Presumably, the "flood of litigation" that petitioners anticipate would have occurred prior to this Court's decision in *Polk County* v. *Dodson*, where a defender's potential liability under § 1983 was severely curtailed. Following *Polk County*, a public defender is subject to § 1983 liability only when he deprives another of Constitutional rights through a conspiracy with a public official, because a lawyer's traditional functions as counsel to a defendant are not performed under "color of law." 454 U.S. at 325.

The dreaded "flood of litigation" is mere puffery. The solution to heavy federal caseloads is not the reduction of constitutional remedies.

> As long as attention focuses on whether there are too many section 1983 cases, one need not focus on the larger question on what the law of constitutional remedy should be. Even if there are 'too many' section 1983 cases, we would have to decide whether the attendant problems are tolerable in light of the protections afforded constitutional rights. The numbers game provides a convenient distraction from the underlying issues. Eisenberg, *supra*, 67 Cornell L. Rev. at 549.

Statistics do not warrant a grant of public defender immunity when it will erode the constitutional protections offered by a federal forum.

C. Public defenders are not required to reallocate resources in order to defend prisoner initiated § 1983 suits.

While it is axiomatic that the time spent by public defenders for the defense of civil suits brought by former clients will reduce their time available for criminal defense, empirical evidence demonstrates that defenders actually devote little time to the defense of § 1983 suits. Claims against defense counsel are comparatively insignificant to other § 1983 claims, and the few cases that do survive dismissal are collectively insubstantial so as to require defenders to reallocate temporal resources.

Cost figures for the defense of prisoner § 1983 suits are not available. Most public defenders should be covered by malpractice insurance, so defender systems suffer a minimal financial burden.[14] In addition, as this case ex-

[14] Public defender programs have access to low cost professional liability insurance through membership in the National Legal Aid

emplifies, public defenders can obtain legal representation through the state Attorney General. It is the legislature's role to provide additional funding for the programs they create. Fundamental constitutional rights should not be prematurely and needlessly curtailed upon the basis of petitioners' speculative and exaggerated claims.

D. The recruitment and retention of public defenders will not suffer as a result of § 1983 liability.

Public defender quality and quantity will not be adversely affected if defenders are not given immunity from § 1983 actions. Some courts have accorded grants of public defender immunity based upon such speculation, *Black* v. *Bayer*, 672 F.2d 309, 319 (1982), but these speculative consequences are unsupported by empirical evidence. *See Ferri*, 444 U.S. at 204-205.

Survey results in California demonstrated that "apparently, the reality of malpractice has not occurred to most public defenders and very few plans have been made for such a contingency." Mallen, *supra*, 14 Am. Crim. L. Rev. at 70. All lawyers face the possibility of defending a malpractice claim, frivolous or otherwise, but this drawback has not reduced the number of attorneys seeking employment.[15] Statistics show that private counsel are

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and Defender Association. NLADA, *Thou Shalt Not Ration Justice*, 17 (Dec. 1982) (circular distributed to new members).

[15] Between 1,575 and 2,000 full-time counsel would be required to represent all indigent misdemeanants . . . These figures are relatively insignificant when compared to the estimated 335,200 attorneys in the United States . . . a number which is projected to double by the year 1985. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Argersinger* v. *Hamlin*, 407 U.S. 23, 33 n.7 (1972).

ready and willing to represent criminal defendants, despite § 1983 exposure. *See* Mallen, *supra*, 14 Am. Crim. L. Rev. at 69.

Chief Judge Bazelon has noted that the number of criminal malpractice suits "is not at all significant now." *Bazelon, supra*, 42 U. Cin. L. Rev. at 17. Another commentator stated that "there have been few malpractice suits brought against criminal attorneys, and thus far, the number of successful suits has been miniscule." Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, Wis. L. Rev. 473, 515 n.175 (1982). *See also* Kaus and Mallen, *The Misguiding Hand of Counsel—Reflections on Criminal Malpractice*, 21 UCLA L. Rev. 1191, 1193 (1974).

A denial of public defender immunity will not affect the retention of defenders. Lawyers hired by the Legal Services Corporation work under many of the same conditions as public defenders, e.g., low pay, high case-loads, a clientele that is exclusively indigent, and the threat of potential § 1983 lawsuits. Handler, Hollingsworth and Erlanger, *Lawyers and the Pursuit of Legal Rights*, 178 (1978). The Handler, *et al* study pointed to "structural reasons why lawyers . . . leave Legal Services, [that are] not necessarily related to a change in or lack of commitment. Working conditions in Legal Services offices are poor. Lawyers are inundated with masses of cases that cause feelings of monotony and the conviction that legal skills are being wasted on routine tasks." *Id.* The defense of potential § 1983 suits is not a primary nor even a substantial reason that criminal defense attorneys change employment situations.

Finally, petitioners' assertion that absolute immunity would encourage more competent attorneys to apply for public defender positions is specious. It is the mediocre

lawyer who must fear malpractice liability, and who will find a position that enjoys absolute immunity particularly attractive. Tort liability encourages adherence to prescribed standards of conduct, as evidenced by the American Bar Association's view that attorney efforts to limit liability to clients is unethical. *See* Model Code of Professional Responsibility DR 6-102.

Criminal defendants are already subjected to inferior legal representation. For instance, Chief Judge Bazelon explained that "what I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed by the Sixth Amendment." Bazelon, *supra*, U. Cin. L. Rev. at 2. The National Legal Aid and Defender Association has also concluded that "the scope of representation provided for indigent defendants in many jurisdictions does not even meet specific constitutional directives of the Supreme Court." National Legal Aid and Defender Association, *The Other Face of Justice* 70 (1973).

Indigent criminal defendants have echoed these concerns, expressing the belief that appointed counsel are inferior substitutes for retained attorneys. *See* Casper, *Criminal Courts: The Defendant's Perspective* 31, 81 (1978). Public defender immunity would only work to exacerbate an already intolerable situation.

CONCLUSION

The broad remedial purpose of § 1983, combined with legal history, common law principles, and public policy considerations mandate that public defenders should not gain governmental or quasi-judicial immunity under § 1983 because they perform a purely private function.

The decision of the Court of Appeals for the Ninth Circuit, which held that public defenders do not have immunity under § 1983, should be affirmed.

Respectfully submitted,

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